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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee

On Appeal From the Court of Appeals of the State of New York

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF THE AMICUS CURIAE *

Two terms ago, Mr. Justice Powell, speaking for a majority of the Court, counseled that in the careful delineation of First Amendment rights, the appropriate question is not whether corporations have First Amendment rights, but whether the speech which is to be protected is itself of that type which the First Amendment was intended to protect. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 776 (1977).

* This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42.

And, in so holding, the Court reaffirmed that, "a broad conception of the First Amendment is necessary to supply the *public need* for information and education *with respect to the significant issues of the times.*" *Wood* v. *Georgia,* 370 U.S. 375, 388 (1962) (emphasis supplied) (footnote omitted).

The Chamber of Commerce of the United States of America (the Chamber),[1] which had submitted to the Court a brief *amicus curiae* in support of the appellants' position in *Bellotti,* believes that that decision laid to rest the myth that the modern business organization, whether or not incorporated, is *persona non grata* in the "marketplace of ideas" *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969), where First Amendment values are both the medium of exchange and the protective source of commerce in political and social thought, belief and ideas.

In the instant case, however, the New York Public Service Commission (NYPSC) and the New York Court of Appeals have, in the view of the Chamber, ridden roughshod over what the Chamber and its members believe to be both the elemental teaching of *Bellotti* and the fundamental concepts embodied in the First Amendment. By labelling NYPSC's prohibition upon the dissemination of billing inserts which discuss "controversial issues" (App. 43a) as "time, place and manner" restrictions (App. 9a), the Court below and the NYPSC would seek to vitiate these important principles. And, by invoking in essence the right of privacy on behalf of the customers of Consolidated Edison (App. 43a, 10a), the Court below and the NYPSC would attempt to create a specious conflict between the First Amendment and the penumbral right of privacy *Griswold* v. *Connecticut,* 381 U.S. 479, 484 (1965), thereby placing that state agency in the position of balancing constitutionally protected rights.

[1] The Chamber of Commerce of the United States is the largest federation of business, trade and professional organizations in the United States. Today, the Chamber has more than 90,000 members, including 86,257 businesses, 1,287 trade and professional organizations and 2,661 local and state chambers.

Thus, no less than in *Bellotti,* the interest of the Chamber and its members in the instant case is rooted in the potential impact of this case as a precedent which will determine their ability to speak freely on issues of vital concern to the Nation, their respective States and localities. The Board of Directors of the Chamber has long recognized that business leaders have the obligations, *inter alia*:

> To guard against unjustifiable restraint, direct or indirect, upon the free and frank expression of opinion on public issues by business and businessmen.
>
> To recognize social as well as economic obligations and to accept the assumption of leadership in meeting the problems and needs of the community.
>
> Policy Declarations Adopted by the Chamber of Commerce of the United States of America (1978 ed.) at 171.

Furthermore, the Chamber includes among its members not only those business organizations which would engage in protected speech, but also those organizations which, in their role of commercial customers, suppliers of goods or services, or members of affiliated or related lines of business, are potential recipients of such pro-

tected communications.[2] And, the Chamber submits, these recipients have a First Amendment right, coextensive with that of the speaker, to receive, evaluate, accept, reject or modify any information or point of veiw.

In sum, the Chamber's interest in the instant case transcends the facts of this case, for, as the Court has previously noted: "Freedom of discussion, if it would fulfill its historie function in this Nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Wood* v. *Georgia,* 370 U.S. 375, 388 (1962).

ARGUMENT

I.

Over the past decade, "institutional advertising" by business organizations, in which significant public policy issues are discussed, at the business' expense, in the print and electronic media, has experienced a substantial growth and has become a commonplace occurrence. *See, e.g.,* S.P. Sethi, Advocacy Advertising and Large Corporations 15-17 (1977). Indeed, payroll stuffers (messages included in pay envelopes), special slide presentations directed to employees, shareholders and customers on public affairs issues, and billing inserts, such as those which are at issue in the present case, are

[2] The Chamber notes that although the facts of the instant case are restricted to proposed communications from Consolidated Edison to its customers, the prohibition of the NYPSC presumably would have applied with equal effectiveness had Consolidated Edison also proposed, for example, to include such communications with the checks it mails out when it pays its bills to its suppliers.

all being utilized by businesses to express their respective viewpoint on matters of pressing concern, at the national, state or local level. *See, generally,* Contact: A Directory of Interpreting Business/Economic Education Programs (Chamber of Commerce of the United States 1978).

This activity is the natural and inevitable result of the evolution of the modern business organization, especially the modern business corporation. As Mr. Justice Jackson observed thirty-seven years ago:

> Whether for good or ill, the stubborn fact is that in our present system the corporation carries on the bulk of production and transportation, is the chief employer of both labor and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there is no present substitute for it except the state itself. *Tax Commission* v. *Aldrich,* 316 U.S. 174, 192 (1942) (Jackson, J., dissenting).

The Chamber would hasten to note that this phenomenon, albeit of relatively recent vintage, is not limited to a handful of large corporations. Rather, business organizations, like all social institutions, vary in size and complexity from multinational enterprises whose stock is publicly held and traded to medium size public companies and to those that are closely held and controlled by an individual or family. And, it cannot be gainsaid that they are not homogenous, for, like individuals and groups, business organizations do not possess monolithic views on issues of concern to the public at large. *Accord, First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785 n.22 (1977). Indeed, in a socio-political economy in which government regulation is itself such an integral part of each of our lives, the

outcome of virtually every public policy debate, either directly or indirectly, touches no less upon the well-being of business enterprises than it does upon each of us personally, whether the issue is the taxation of personal income, as in *Bellotti, supra,* or the availability of future energy supplies and the role of nuclear power, if any, as a source for our energy needs.

It is precisely because modern business organizations have evolved into social institutions which are so intimately interwoven into the American socio-economic-political fabric that they have increased their involvement in recent years in the public affairs arena. In the view of the Chamber this result has come about for two reasons: first, in partial fulfillment of management's responsibility to the owners of the business to husband and protect the assets of the enterprise; and, second, in partial fulfillment of business' responsibility to contribute whatever special expertise it may possess to to an informed public debate on issues of concern to society.

It is, of course, elementary that a primary legal responsibility of management is to act in the best interests of the owners of the capital which they are employed to safeguard and increase. And, whether failure to discharge that legal responsibility is termed "corporate waste", "breach of fiduciary duty" or "gross neglect and mismanagement", traditional legal remedies are available to owners when management has failed to fulfill its obligations.

In the public affairs context, the Chamber submits, management has no less a responsibility to speak out on behalf of the owners on matters which touch the interests of business. Indeed, one member of this Court has stated the obligation of management thusly:

> The day is long past when the chief executive officer of a major corporation discharges his responsibility by maintaining a satisfactory growth of profits, with due regard to the corporation's public and social responsibilities. If our system is to survive, top management must be equally concerned with protecting and preserving the [private enterprise] system itself. This involves far more than an increased emphasis on "public relations" or "governmental affairs"—two areas in which corporations long have invested substantial sums. L. Powell, "Attack on American Free Enterprise System" Confidential Memorandum to Mr. Eugene B. Sydnor, Jr. Chairman, Education Committee, U.S. Chamber of Commerce, Aug. 23, 1971 (reprinted in Washington Report) at 3.[3]

The Chamber would respectfully suggest that Mr. Justice Powell's comments apply with equal vigor to every business person, regardless of the size or form of organization of the enterprise which that person helps to direct. And, although failure to participate in the public affairs decision-making process does not create a legal cause of action capable of judicial resolution, the Chamber does suggest that those basic principles of business law alluded to above do give legitimacy to business' involvement in public policy debate.

Moreover, the evolution of the modern business enterprise has given rise to the recognition of business' responsibilities to the society in which business functions and from which it draws sustenance. *See,* D. Linowes, "The Corporate Social Audit," in Social Re-

[3] Mr. Justice Powell's comments, of course, predated his nomination to the Supreme Court.

sponsibility and Accountability 93 (1975); K. Davis and R. Blomstrom, Business Society and Environment: Social Power and Social Response 413 (3rd ed. 1975); C. Madden, Clash of Culture: Management in an Age of Changing Values 74 (1972); *see also,* L. Powell, *supra* at 7.

In order to fulfill these responsibilities, business must be able to communicate freely and effectively with the citizenry at large:

> Freedom of the press and other mass communications is not an end in itself but it is a means to an end of a free society. Obviously, mass communication is not set up simply for the profit of business. Business's social role is to provide the people a valuable service which helps maintain their freedoms. Davis and Blomstrom, *supra* at 413.

And, for such communication to be meaningful, other business enterprises, as part of the citizenry at large, must also be free to receive those communications, so that they may be evaluated, accepted, rejected or modified.

II.

We come then to the specific prohibition of the NYPSC, ratified by the New York Court of Appeals below, which offends traditional First Amendment values and would create a specious barrier to communication in the guise of the "right of privacy."

At the outset, it must be noted that the communication at issue here is no different than that which would be made by any other profit-making enterprise. The issue in this case is not whether the cost of the billing inserts will be factored into rate base calculations. To

the contrary, the appellant has already agreed that, in this instance, the cost should be borne by the shareholders of the company. Juris. Statement at 10. As a result, the propriety of this prohibition as a restriction imposed upon a regulated industry need never be addressed.[4]

Second, the Chamber notes that the court below would sanction this prohibition as a mere restriction on the "time, place and manner" of the communication, arguing that the prohibition is "content neutral." App. 9a-11a. With respect to this argument, the Chamber defers to and joins with the arguments advanced by the appellant, except to emphasize that, regardless of the characterization of the prohibition, it must be found to be unconstitutional if its affect is to so impair the ability of the parties to engage in meaningful communication that the core purpose of the First Amendment guarantee is rendered meaningless. And, in this regard, the Chamber notes with great concern the apparent failure of the court below to consider as material the apparently incontroverted evidence submitted by appellant that, "[I]t lacks ample alternative channels for the communication of this information, because other means of communication involve more cost, are less likely to reach Con Edison's customers, and may be less effective (R. 112-15)." Juris. Statement at 6.

What is left, then, is the rationalization of the NYPSC that the prohibition is necessary, because of the appellee's belief that, "using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to

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[4] Consequently, the Chamber expresses no view on the constitutional implications of that question.

taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism." App. at 43a. The court below, in turn, characterizes this belief as a desire by the NYPSC "to vindicate the privacy rights of utility customers." App. at 9a.

In conjuring up this justification, however, the court below has attempted to create a false conflict between the First Amendment and the constitutionally protected privacy rights of individuals, for, as will be shown below, the right of privacy is limited to "only personal rights, that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 65 (1973) *quoting Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937). *See also, Roe* v. *Wade,* 410 U.S. 113, 152 (1973). The receipt of unsolicited billing inserts by customers of Con Edison, cannot, in good faith, be considered a violation of such a fundamental right.

III.

Historically, the right of privacy is rooted in the Bill of Rights, specifically, in "penumbras" emanting from those guarantees. In *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), this Court stated:

> "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without

> the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" *Id.* at 484.

In recognizing a right of privacy, this Court has acknowledged that a broad interpretation of such a right could "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California,* 403 U.S. 15, 21 (1971). Accordingly, the right of privacy has traditionally been limited to a narrow range of privileges.

For example, the right of privacy has been found to protect the "personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." *Paris Adult Theatre I, supra* at 65. *See also, Roe* v. *Wade,* 410 U.S. 113 (1973), *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), *Stanley* v. *Georgia,* 394 U.S. 557 (1969), *Loving* v. *Virginia,* 388 U.S. 1 (1967), *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942). In addition, the right has been extended to "shield intimate and personal characteristics and activities from public gaze," to protect against "such disparate abuses of privacy as the *unreasonable* seeking, gathering, storing, sharing and disseminating of information by humans and machines," and to "[proscribe against] dehumanizing conduct

which assaults 'liberty, personality and self respect.' " *Galella* v. *Onassis,* 353 F.Supp. 196, 232 (S.D.N.Y. 1972), *modified on appeal,* 487 F.2d 986 (2d Cir. 1973) (emphasis supplied). *See also,* Fried, Privacy, 77 YALE L.J. 475, 485 (1968). Furthermore, any intrusion into the home which constitutes an invasion of privacy must be something which is "offensive or objectionable to a reasonable man." Prosser, Law of Torts 808 (4th ed. 1971).

In this case, there has been no intrusion into the "personal intimacies" of the home which a reasonable man would find offensive. As appellant stated in its Jurisdictional Statement:

> ". . . bill inserts are possibly the least intrusive means of communication. They are much less intrusive than doorbell ringing and door-to-door communication . . . or communication by telephone. The homeowner may pick up the mail at his convenience and may dispose of unwanted messages at will." Juris. Statement at 26.

Similarly, in *Lamont* v. *Commissioner of Motor Vehicles,* 269 F.Supp. 880 (S.D.N.Y. 1967) *aff'd* 386 F.2d 449 (2d Cir. 1967) (mem.), the New York District Court stated:

> "The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect the 'privacies of life.' The short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Lamont, supra* at 883.

Furthermore, although some individuals may disagree with the material printed in the inserts, it cannot

be argued that this material is offensive in the sense that this Court has defined the term. For, "much that we encounter offends our esthetic, if not our political and moral, sensibilities." *Erznoznick* v. *City of Jacksonville,* 422 U.S. 205, 210 (1975). And, it is settled that the public expression of ideas may not be prohibited merely because the ideas themselves may be offensive or annoying to some hearers. *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971), *Street* v. *New York,* 394 U.S. 576 (1969), *Wiegand* v. *Seaver,* 504 F.2d 303 (5th Cir. 1974), *appeal dismissed* 421 U.S. 924 (1975), *Waters* v. *Peterson,* 495 F.2d 91 (D.C. Cir. 1973). It is only where the speaker seeks to "force public confrontation with the potentially offensive aspects of the work," that proscription of speech may become appropriate. *Ginzburg* v. *United States,* 383 U.S. 463, 470 (1966). And, it may not be the content of the speech, as much as the deliberate "verbal [or visual] assault" of the speech which justifies its proscription. *Redrup* v. *New York,* 386 U.S. 767, 769 (1967). *See also, Erznoznick* v. *City of Jacksonville, supra,* at 210, n. 6.

At most, a customer discovering a bill insert may feel annoyance, directed either at the contents of the insert or at Con Edison itself. This annoyance, when viewed in the First Amendment context of the "uninhibited marketplace of ideas," *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969), cannot constitute a violation of the narrowly drawn right to privacy which this Court has recognized. It is indisputable that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of

speech and of press." *Time, Inc.* v. *Hill,* 385 U.S. 374, 388 (1967).

No matter how unpleasant we may find the ideas and presence of others, they cannot be avoided:

> 'It might be a lovely world if we could always go about our business without interference, but such a world is likely to be found only by the hermit. Anyone who interacts with other human beings to any significant degree, either within or outside of his home situation, knows that there must be a constant process of accommodation between one's own needs to communicate and the needs of others. We are constantly called upon to interrupt what we may be doing or thinking because someone else wishes to communicate with us. Even though they may be our friends, associates, or loved ones approaching us for perfectly legitimate reasons, there are times when we may find the mere fact of the interruption distracting, inconvenient, annoying, or downright maddening. Of course, those feelings of annoyance are heightened when we feel that the other person has no business approaching us in the first place, or when the content of the message is something we would rather not hear." F.S. Haiman "Speech v. Privacy: Is There A Right Not To Be Spoken To?" 67 Nw.U.L.R. 153, 187 (1972).

Because "virtually every governmental [and private] action interferes with personal privacy to some degree," the question is "whether that interference violates a command of the United States Constitution." *Katz* v. *United States,* 389 U.S. 347, 350 n. 5 (1967). To classify the mailing of bill inserts as a violation of a customer's constitutional right of privacy would stretch that doctrine beyond reason, and would virtually obliterate the First Amendment safeguards against arbitrary and unconstrained proscription of speech.

This questionable relationship between the right of privacy and unsolicited direct mail, whatever its source, has been publicly acknowledged. The Report of the Privacy Protection Study Commission states that:

> "Except for one, none of the witnesses in the Commission's mailing list hearings were willing to acknowledge that privacy issues are involved in direct mail marketing practices at all. Some were willing to admit that unsolicited mail could be a nuisance, an annoyance, or even an abomination—but not a trespass on personal privacy. If an individual does not wish to read his unsolicited mail, they argued, he has an easy option—throw it in the trashcan. Even the United States Postal Service took this view." Personal Privacy in an Information Society 149 (July 1977).[5]

Representative Morris K. Udall has framed the issue as follows:

> "Does unsolicited mail, in and of itself, constitute an invasion of privacy? I say no. My reasons are these: 1) Privacy is a relative right. As long as man lives in a society, he cannot totally divorce himself from its intrusions. His fellowmen must have some way—like the printed 'broadsides and town criers of Colonial America'—to reach him, to prod his conscience. 2) The First Amendment guarantees us the freedom of speech and press. I believe it would be an infringement to say, 'You cannot use the mails to send your message to people who haven't requested it.' 3) If unsolicited mail were an invasion of privacy, our political processes

[5] In fact, statistics of the United States Postal Service show that 42% of all direct mail received is actually considered to be useful information by the recipient and 63% of all direct mail is opened and read. National Consumer Attitude Survey of Advertising Mail, U.S. Postal Service (1972).

would be in jeopardy. 4) Not just advertising matter, but *most* mail is unsolicited and often unwanted—for example: bills, letters from lawyers, tax notices, charity solicitations, calls to jury duty and even some personal letters." M. Udall, "Is Unsolicited Mail an Invasion of Privacy?" American Legion Magazine 37 (Sept. 1970).

In light of this, the First Amendment would suffer a severe setback if the appellant was prohibited from mailing bill inserts because they were found to violate a 'customer's right of privacy. Such a retraction of First Amendment rights cannot be rationalized, as appellee would have this Court do, on grounds that the constitutional intrusion is negligible because alternative methods of communication are available to appellants. As this Court stated in *Boyd* v. *United States,* 116 U.S. 616 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd, supra* at 625.

CONCLUSION

For the reasons set forth above, the Chamber, as *amicus curiae,* hereby respectfully requests that the decision of the Court of Appeals of the State of New York be reversed.

Respectfully submitted,

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